Office Supreme Court U. S.
FILED
APR 25 1902
JAMES H. McKENNEY,
Clerk.

No. 96

Brf. of Chadbourne for Appellee

Filed Apr. 25, 1902.

Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

NO. 320

THE DIAMOND MATCH COMPANY,
Plaintiff,
vs.
THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE,
Appellee.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Brief and Argument for Appellee.

T. L. CHADBOURNE,
SOLICITOR FOR APPELLEE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 320.

THE DIAMOND MATCH COMPANY,
Appellants.

vs.

THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE, *Appellees.*

Appeal from the Circuit Court of the United States for the Western District of Michigan.

BRIEF AND ARGUMENT FOR APPELLEES.

REMARKS TOUCHING THE STATEMENT OF FACTS CONTAINED IN THE BRIEF FOR APPELLANT, SUBMITTED BY MR. EDWIN WALKER, SOLICITOR FOR APPELLANT.

The facts as they are there set forth are not controverted, except as follows:

1. About the middle of page 2 of that brief, it is stated that the logs cut by appellant were for appellant's use in the regular prosecution of its business and for sale "in open market." No part of the record supports, so far as I can see, that portion of the statement above quoted. Indeed the complain-

ant desribes itself as "engaged * * * in the manufacture and sale of matches" (Transcript pages 1 and 26).

2. Near the top of page 3 of that brief, it is stated that the pier jams and booms of appellant were beyond the municipal limits of both the village "and township" of Ontonagon. I find nothing in the record justifying that part of the above statement put in quotation marks.

These pier jams were, as appears by paragraph 5 of the stipulation, on page 9 of that brief, more than one mile above the mouth of the river and beyond the limits of the *Village* of Ontonagon. So also in paragraph 6 of the stipulation on the same page of the brief. So in paragraph 1 of the stipulation, near its end, on page 7 of that brief.

These pier jams were in fact within the limits of the Township of Ontonagon, though not within the limits of the Village of Ontonagon. So the bill of complaint alleges, thus, "they are driven down the tributaries of said Ontonagon river into the stream of said river, and thus down said Ontonagon river to a point at or near the mouth thereof in the *Township* of Ontonagon to the sorting grounds and pier jams of the complainant." (See transcript, page 2, at the close of paragraph 2 of the bill).

This allegation of the bill is admitted by the answer, as follows:

> "They admit that said logs were driven down said tributaries of said Ontonagon river and down said river and to the sorting ground and pier jams as alleged."

To make the situation of the logs, at the time of the assessment in question, clear, I will add that at that time the logs were in the Township of McMillan in Ontonagon county, which township was above the Township of Ontonagon on the course of the Ontonagon river.

See paragraph 7 of the stipulation, as quoted in that brief, on page 10 thereof.

3rd. At page 3 of that brief, at the end of the first paragraph on that page, the following statement is made: "Until about the first of May following there were practically no logs either *in transit* or in storage booms, etc." The above words, "*in transit*" are challenged, because they import a conclusion of law. Whether the logs were in transit in the sense of the Michigan statute providing for the taxation of property in that condition, and whether they were in course of export in the sense of the Federal constitution, are two questions in the case not to be prejudiced by anything purporting to be a recital of facts made in such manner as to conclude questions of law.

4. On the same page 3 of that brief, just above the words last above noticed, appears the following statement, namely, that the logs in question, in May, 1899, were within the Township of MacMillan, but not within the limits "or jurisdiction" of either the Village or Township of Ontonagon.

Now the question whether the logs were within the "jurisdiction" (for taxation) of the Township of Ontonagon was formerly, and whether within the jurisdiction of the Village is now, one of the ques-

tions of law in this case, and therefore it is not to be foreclosed by what purports to be a statement of facts. We allege and complainant denies, that the logs were in transit in the sense of the State statute at the time of the assessment, and we deny and appellant alleges, that if they were so in transit they were also in course of export in the sense of the Federal constitution; and we allege and appellant denies that the logs were within the jurisdiction (for taxation) of the Village of Ontonagon at the time of the assessment.

5th. Referring to the statement at the top of page 7 of the brief, to the effect that the last stipulation filed was intended to cover the preceding stipulations filed, and to embody all of the essential facts, we demur, and call the attention of the Court to all the stipulations upon the facts made between the parties, which are contained within pages 24 and 28 of the transcript.

6th. In addition to the stipulations of fact set forth on pages 7, 8, 9 and 10 of that brief, the following stipulations of fact should be added, which will be found set out on pages 25 and 26 of the transcript, namely:

> "1. Complainant shipped by rail from the Village of Ontonagon to its mills at Green Bay, Wisconsin, for sawing there, the following quantities of logs, at the following times, out of its logs in the Ontonagon river, described in the bill of complaint.
>
> Forty-two million feet in the season of 1897; thirty-seven million feet in the season of 1898, and fourteen million feet in the season of 1899

up to the date of the seizure of logs by the Village of Ontonagon for the satisfaction of the tax levied and assessed in and by said village in the year last named."

"2. Within the Village of Ontonagon, is, and has been, situated in and throughout the year 1899 the last boom or sorting gap in said river, from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid."

"3. During the season of 1899, beginning about June 1st, and up to the time of the seizure above mentioned, about ———— million feet of the ten (10) million feet of logs mentioned in the bill of complaint, were driven down the said river from the boom, pier jams or sorting grounds outside of said village, to the boom or sorting gap within said village, above described, and shipped thence by rail to complainant's said mills at Green Bay."

"4. About five hundred thousand feet of complainant's said logs in said river have been (in said river or slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid."

"5. The Village of Ontonagon is a duly incorporated village under the general laws of Michigan, to-wit: Act number 3 of the Laws of Michigan of the year 1895, entitled 'An Act to provide for the incorporation of villages within the State of Michigan, and defining their powers and duties,' and is situate on said river and in the Township of Ontonagon, one of the defendants herein."

"6. The water transit of said logs of complainant has heretofore always ceased since the burning of complainant's mills, described in the

bill of complaint, in said village, whence the same are shipped by rail as aforesaid."

"7. Said river and its tributaries are streams of water or rivers, all within the State of Michigan and within the County of Ontonagon (and as to some small part within the Counties of Gogebic and Houghton) in which County of Ontonagon said village is situated."

"8. Pursuant to and in accordance with the acts of the legislature of Michigan mentioned in the answer of said village in this suit, namely, Act number 319 of the Laws of 1893, and Act number 263 of the year 1895, and pursuant to and in accordance with a vote of the electors of the said village, duly held therein, and pursuant to, and in accordance with the action of its council, said village in the year 1894, borrowed the sum of thirty thousand dollars ($30,000), and issued and sold its bonds therefor, and in the year 1895 borrowed the further sum of twelve thousand dollars ($12,000) and issued its bonds therefor, and all of said bonds, being in principal and interest about forty thousand dollars ($40,000), were, at the date of filing the bill of complaint in this cause, outstanding, and said bonds outstanding constitute a valid charge against said village and against the taxable property thereof."

ARGUMENT ON BEHALF OF APPELLEES, THE VILLAGE OF ONTONAGON AND ITS TREASURER.

I

CONCESSIONS.

We have always conceded, and do now concede, appellant's contention, stated as paragraph IV on

page 13 of its brief, that under the facts of this case equity has jurisdiction to enjoin the collection of the tax, assuming that the tax is not warranted by the laws of Michigan. At the beginning of this litigation and until a time shortly before the decree was pronounced by the Circuit Judge, in addition to the parties defendant now appearing, the Townships of Ontonagon and MacMillan, both in the County of Ontonagon, were defendants in the proceedings. As all these municipalities claimed the right to tax the logs in question and had proceeded to do so, and as all of them could not have that right, and as the complainant had, under those circumstances, no adequate remedy at law to determine its rights and the rights of those three municipalities, the defendants now upon the record have never challenged the jurisdiction of chancery to interpose as prayed in the bill of complaint, and do not deny the propriety of the remedy by injunction on the case made by the bill. Nor do we see any reason to doubt the correctness of the position taken by the appellant on page 12 of that brief, numbered 1, that the Village of Ontonagon had no power to assess property for taxes levied thereon except that conferred by the general or special statutes of the State of Michigan.

II.

We take issue with the appellant on the positions taken by it and numbered II and III on pages 12 and 13 of that brief. First, as to the position numbered

II, we submit that the State of Michigan could, by legislative grant, authorize the Village of Ontonagon to impose a tax upon the property of non-residents, when the situs of such property was beyond its geographical limits. Whether property so situated is beyond its taxable "jurisdiction" is the question to be considered.

The assessment complained of was made under a statute which is quoted correctly, except as to a few verbal inaccuracies not important here, at pages 24 and 25 of that brief. This legislation is comprised in Act number 32 of the Public Acts of 1899 of the State of Michigan.

The purpose of this part of the Act is to provide for the assessment and taxation of a certain kind of personal property situated in a peculiar and exceptional manner described in the Act. It applies to residents and non-residents of the state alike, and to property destined to points within, as well as without the state. The property provided for is what is described in the act as "forest products." It is to be assessed where it "may be" on assessment day, except in cases where it is in transit to some place within the state, it shall be assessed not where it is in fact, but in the place to which it is in transit; and except that where it is in transit to some place without the state, it shall be assessed at that place in the state nearest to the last boom or sorting gap of the stream in * * * * this state in which the property will naturally be last floated during its transit.

Passing for the present the question whether this

part of this statute is in conflict with the constitution of the United States, a question considered in the next division of this brief, we submit that it is clearly competent for a state, where personal property is so situated that to define with precision its locus on the day of assessment is difficult, or is likely to lead to misunderstandings or conflict, to provide that it shall be assessed for taxation and taxed in a certain municipality, although as a matter of fact on that day it may not be locally present in that municipality.

The situation is this. Logs cut in the woods and hauled during the winter into the streams intended to transport them to or toward the place of manufacture, may be, and generally, or often, are, (in the State of Michigan, on the day of general assessment in April), *afloat* upon those streams and in motion, and actually and necessarily situated on that day in different municipalities through which the stream flows. Owing to the fact that the logs extend into different municipalities, and are or may be in motion, it would be difficult for these municipalities always, and in many cases would be impossible, to determine how much of a mass of logs was actually situated in each of such municipalities on that day. The attempt to make such determination would, in many cases, inevitably give rise to conflict, if not between the municipalities, yet certainly between the municipalities and the owners of the property, and would inevitably result in injustice to one or more of the municipalities, as well as in injustice to the owner of the property. To say that under such cir-

cumstances the state has not a right in its discretion to prescribe in which municipality of those through which they pass, the logs shall be taxed, is to say in substance that it has no right to protect itself against loss of revenue, nor the owner of the property against the injustice which is almost certain to befall him unless the state exercises this power. That the state should have the power to exercise the right is in fact less important to it than to the owner of the property.

These considerations are in no manner impaired by the fact that in this particular locality the winters are, usually, so severe that on the general assessment day in April the streams are closed by ice. Although this is true, it is also true that many of the streams in the state are at that time open, and the logs which have been cut and put upon them for transportation are in motion towards their destination. Whether, therefore, the embarrassment which would surround the assessment of logs if that assessment were to be made always in the municipality in which the logs were actually present on assessment day, in a given case exists, depends, first, upon the latitude of the stream within the state, and, second, upon the temperature prevailing in a given locality. The legislation in question is for the whole state, and the fact that it may be needless for a particular part of the state, or in a particular season, is, of course, of no consequence.

Appellant has quoted in his brief no case which deals with, or touches upon such a situation, and no case deciding that it is not competent to confer up-

on a municipality the right to tax personal property, which, owing to the above conditions, is not upon assessment day within its geographical limits, nor have we anywhere found any such case adverse to us.

Michigan is not the only state having legislation of this sort. There is similar legislation in at least the following states: *In Wisconsin* logs are to be assessed in the district where the mill where they are to be cut is situate, although the logs are elsewhere on assessment day and the owner does not reside there. Rev. Stat. of Wis. 1878, Sec. 1040. *So in Maine*, as appears by the case of Inhabitants of Farmingdale vs. Berlin Mills Co., 93 Me. 333, (cited from 45 Atl. Reporter 39). Such legislation is common, and no reason appears impeaching either its justice or conformity with the State Constitution.

In the absence of any cases known to us to the contrary, and in the absence of any argument in the appellant's brief, under paragraph 2, discussing the question under the state of facts here existing, we deem it unnecessary to argue this question at large.

It seems clear that the position here taken nowise conflicts with the principle, that property which is not protected by the municipality shall not be taxed by it. It appears from the record, first, that five hundred thousand feet of the logs in question were actually present in the Village of Ontonagon on assessment day (see page 18, paragraph "4" of appellant's brief), and that all of the property in question, on its course to its destination, would pass through and would remain a longer or shorter time

within the Village of Ontonagon. (See transcript, page 25, stipulations numbered 2, 3, 4, 5, 6 and 7). Surely the Village is not called upon to keep the property within its limits and there protect it for an entire year, or for any considerable time, in order to earn the privilege of taxing its owner on its account.

Of the cases cited by appellant in this part of its brief, *Wells* v. *Weston*, 23 Missouri, 384, and the Township of Flatbush case, 60 N. Y., 398, were cases concerning the taxation of land. The case of *Trigg* v. *Glasgow*, 2 Bush, 594, seems to have turned upon the construction of a statute, reading as follows: "All the taxable property *in* said town on the 10th of April shall be subject to taxation for the payment of said subscription," and providing that the taxable property *in* said town which may have been removed without its limits between the first of January, and the tenth of April for the purpose of evading the tax, shall be listed for taxation." The property which the Court decided was not subject to the tax seems never to have been in Glasgow; that is to say, it consisted of "choses in action, money and mercantile interests in Louisville." The Court decided that Section 16 of the Act as quoted in the report in connection with the language herein above quoted, limited the property subject to tax to "money and other substantive thing in bank or in the *actual* possession of its owner within the town limits," and that the property sought to be taxed was not such property, nor within the town of Glasgow. The report of the case is not very clear, but such seems to be its import.

City of St. Louis v. *Ferry Company*, 11 Wallace, 430, was merely a determination that under a given state of facts, in the case appearing, certain ferry boats were not in fact situated in the State of Missouri and were in fact situate in the State of Illinois, and were therefore not taxable in the former state. The corporation owning the boats was an Illinois corporation, and a resident of Illinois. The tax was laid upon the property and not upon the corporation, and the property was decided to be located as a matter of fact in Illinois, and not in Missouri, and for this reason not taxable in Missouri. On the face of the legislation, it could not be taxed unless it were "within the city," and it was not in fact within the city.

The case decides only that personal property belonging to a citizen of Illinois and situated in Illinois cannot be taxed in Missouri. It casts no doubt upon the proposition that the State of Missouri is competent to determine in which of its municipalities personal property situate in that state but belonging to a citizen of Illinois may be assessed and taxed.

It is said on page 19 of appellant's brief that:

> "It is a recognized axiom that the state itself has no right or power to impose taxes upon persons or property beyond the limits of the state; its sovereignty extends no further. The same principle limits the power of taxation of municipalities; it has (they have) no power to impose taxes upon persons or property beyond its (their) limits; its sovereignty extends no further."

"Sovereignty" cannot be attributed to a municipality. Its jurisdiction for taxation is what is lawfully conferred upon it by the sovereign state in which it lies; and no reason is perceived why the right to tax personal property which is to pass through it, and of which it is the mediate or final destination, may not, for reasons of convenience of which the state is the proper judge, be conferred upon it. In this case that right was so conferred.

This aspect of the statute has frequently been passed upon by the Supreme Court of Michigan, and no question of its validity under the State Constitution has so far as the cases show ever been raised.

Corning v. *Township of Masonville*, 74 Mich., 177. Here the owners of the logs resided in East Saginaw. The logs were held to be properly assessed in Masonville, Delta county, as being in transit and destined for the sorting or booming grounds situate there, although situate in fact on assessment day in Alger County.

Pardee v. *Township of Freesoil*, 74 Mich., 81. Here the owners were non-residents (of the state apparently). It was held that the logs were properly assessed in Ludington, to which place they were found to be in transit, and could not be assessed in Freesoil, where they were on assessment day.

Elk Rapids Iron Co. v. *Helena Township*, 117 Mich. 211. Here the property was held taxable in Elk Rapids, the place to which it was in transit, and not in other Townships (Milton and Helena), where it was on assessment day.

Assuming now that it is competent for the legislature of Michigan to fix a municipality on the course of the transit of such property for its assessment and taxation, although no part of it was, or all of it was not, on assessment day, in that municipality, I submit that the Village of Ontonagon was that place, and that this municipality rightfully assessed and taxed the appellant for this property.

It is stipulated (see transcript, page 25):

> "2. Within the Village of Ontonagon is and has been situated in and throughout the year 1899, the last boom or sorting gap in said river from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid."

"This fixes in the words of the statute, the Village of Ontonagon as the proper place for the assessmetn of these logs, if they were at that time, in the sense of the statute, "in transit to some place without the state." For in that case the statute provides that "it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in * * * * this state in which said property will naturally be last floated during the transit thereof."

strued legislation substantially identical in its

It is briefly suggested at the bottom of pages 30 and 31 and at the top of page 32 of appellant's brief, that the logs if assessable at all in Michigan, should have been assessed at the Village of Iron Mountain,

at or near which village the logs left the state and passed into the State of Wisconsin.

It is submitted that the statute clearly imports that the Village of Ontonagon was the proper place of assessment if the logs were in transit in the sense of the statute. In order that they should have been assessable at Iron Mountain, the transit of the property must be "other than through any water course in or bordering on the state"; that is to say, if no part of the transit is by water course, the assessment shall be made at the last point reached in Michigan before passing into another state. This seems to me to be so evidently true as to make enlargement upon it needless.

The comments in appellant's brief with respect to the case of *Elk Rapids Iron Company* v. *the Township of Helena*, 117 Mich., 211, make it important to lay before the Court more fully than is done in that brief, the Michigan statutes relating to this subject.

The legislation construed in that case is embraced in sub-division 8 of Sec. 14 and in Sec. 15 of Act No. 206 of the Public Acts of 1893. Said sub-division 8 reads as follows:

> "8. Personal property of non-residents of the state and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township on the second Monday of April of the year when the assessment is made, except that where

such property is in transit to some place within the state it shall be assessed in such place."

Said Sec. 15 reads as follows:

"Sec. 15. All forest products in transit on the second Monday in April in each year and thereafter found in the waters or streams of this state, or on the banks or shores of any lake, pond or stream of this state, when the same is not at the place where it is to be manufactured, shall be held to have a place of destination at the sorting grounds of the rafting and driving agents or booming Company nearest the mouth of the stream, unless the contrary shall be made to appear by the owner or party having the same in charge: *Provided* that all lumber, logs, timber, lath, pickets, shingles, posts, cordwood, tan bark, telegraph or telephone poles or railroad ties that may be piled or left in any yard, railroad reserve, or in any shed, shall not be deemed in transit, but shall be assessed to the person or corporation having control of the yard, railroad reserve, shed or place of storage where the same may be situated at the time provided by law for taking such assessment."

The legislation above quoted will be also found, unchanged, in the Compiled Laws of Michigan of 1897, 1st Volume, page 1193.

This legislation was so amended by Act number 32 of the Public Acts of 1899, that said Sections 8 and 15 were in effect consolidated into a Section numbered 8, which appears with substantial accuracy on pages 24 and 25 of appellant's brief.

The question in the Elk Rapids case is stated to be by the Court as follows: "The sole question is, were these products in transit at the time of the assessment."

Under the law considered in that case, logs if in transit to some place within the State of Michigan, were to be assessed "in such place"; and it was provided that all such property in transit on assessment day and thereafter found in the waters or streams of the State, or on the shores of any lake, pond or stream in the state when not at the place of manufacture, should be held to have a place of destination at the sorting grounds of the rafting or driving agents or booming company nearest the mouth of the stream, unless the contrary should be made to appear.

In the Elk Rapids case, therefore, the court construed legislation substantially identical in its import, as is believed, with that part of the legislation put in force by the Act of 1899, which is here in controversy; that is to say, the part of the Act construed by the Circuit Court below, and here to be construed, being the part which reads:

> "Except that where such property is in transit to some place without the state it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof."

I omit the clause following, providing for a different place of assessment where the property is to be transported other than by a water course, having said all that seems to me necessary to show that that question is not in this case. While it is true, therefore, that the Michigan Court has not con-

strued the whole of this statute as it now stands, it seems to be also true that it has established the meaning of that part of the present legislation which alone is material in this case.

It is submitted, therefore, that the Elk Rapids case governs this case, unless it can be distinguished upon its facts from this case.

As in the Elk Rapids case, the logs in question were destined to Elk Rapids, so in this case they were destined to Green Bay. There the logs were deposited in booms in the stream, as here. There as here large quantities of logs so destined were left over and not transported for a year. This language of the court is applicable here, *mutatis mutandis*.

"It is conceded that from the moment these logs were cut in the woods they were intended to be transported from there to complainant's mill at Elk Rapids for manufacture, and that the only delay contemplated was that caused by the condition of the water." In the case at bar, it would have to be added, it is true, that another cause for delay was the limited capacity of the mill in comparison with the number of logs in the stream, but that circumstance in nowise affects the fact that all the logs were intended to be transported, as soon as practicable under the circumstances, to the mill to be cut. They were also in the same situation, viz.: upon and in the stream which was (in part) to do the work of transportation.

The Elk Rapids decision seems to make the test of transit under the state statute threefold.

1st. That the property be not so situate as to

come under that part of the statute providing that "logs * * * * piled or left in any yard, railroad reserve or in any shed"; to which that part of the statute of 1899 providing for the assessment, in the place where it is, of "all forest products" (not in transit) situate in any premises, store, mill, dock, etc., corresponds.

2nd. That it shall be situate "in the waters or stream * * * * or on the banks or shores of any lake, pond or stream" not being the place of manufacture; to which that part of the statute of 1899 assuming that this class of property is in transit when it is in process of being "floated," and will be detained at a "boom or sorting gap" of a stream wholly or partly within the state, corresponds.

3rd. That it shall be destined for a place beyond where it lies, for manufacture, of which destination the intention of the owner is the best evidence; to which that part of the statute of 1899 providing that "where such property is in transit to some place (within or) without the state," corresponds.

It is submitted that the Elk Rapids case interprets the later as well as the earlier statute in so far as the former bears upon the facts of the case at bar.

The purpose of the later is the same as that of the earlier statute, viz: as above set forth, to prevent embarrassment to assessing officers, loss to the revenue, and litigation to the tax payer, certain to arise out of the conflicting claims of different municipal-

ities in which the property may be in part situated on assessment day.

It is further submitted that if the Elk Rapids case is not a conclusive adjudication, the language of the statute itself and its evident purpose, above dwelt upon, lead to the conclusion reached in that case as the correct conclusion.

That this was the purpose of the former and present legislation in question is further shown in the late case of *Mitchell* v. *Lake Township*, 85 N. W. Rep. 865 (Mich.), not at this writing otherwise reported. Here certain logs situate in several Townships intended for transport to the mill but "piled along a railroad" were held (under said earlier statute) to have been properly assessed in said several Townships; while other logs situate in two different Townships but stored in a lake or storage pond, were held to be taxable only in that one of the two Townships to which they were destined.

It is submitted, therefore, that under the Michigan statutes as interpreted by its highest court, logs are in transit when they are situate upon a body of water intended to act as a means of transport, and destined to some point upon the stream or water beyond where they lie. That such a situation, coupled with the intent of the owner to remove them by the same water where they are stored, to a further point thereon, constitutes the condition intended by the statute by the words "in transit."

Comment on the case in the Menominee Circuit, cited at pp. 32-34 of the other brief, seems uncalled for; both because the case is not authoritative, and

because there is no sufficient statement of facts to make the bearing of the opinion clear.

It may, however, be pointed out that the Court filing that opinion seems to have fallen into the same error believed to have been embraced by the appellant here; namely, that of assuming the status called in the statute "in transit" to be necessarily one with the condition set forth in the Errol case as required to bring property within the interstate commerce provisions of the Constitution of the United States.

There the Court put these two questions, answering the first in the affirmative and the last in the negative.

> "Are the products of a state although *intended for exportation to* another state, and *partially prepared for that purpose* by being deposited at a place or port of shipment within the state, liable to be taxed like other property within the state?"
>
> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?"

Property may therefore be "in transit" as these words are commonly used, and yet not in condition to be protected from state taxation, as exports.

It is not accurate to say, I submit, what is said on pages 37 and 38 of appellant's brief, that the "logs were not assessed in the usual way, for the reason that at the date of the assessment they were not within the corporate limits of the Village of On-

tonagon"; and it is a *non sequitur* to further say that they "therefore were assessed because of their 'anticipated' departure from the Township of McMillan to Green Bay, Wisconsin," etc.

They were assessed in the way all logs "in transit," whether destined to points within or without the state, were required to be assessed.

The reasons for providing that mode of assessment for property so situate are obvious, and have been already stated. The mode of assessment is not "therefore" because of their "anticipated departure" to a further point within or without the state, but because of the difficulties of assessment in the ordinary way. The taxation to which they are made subject is the same to which all property in the state is subjected, and it is levied upon the same day. The place where the tax is to be imposed is exceptional, only because of the peculiar situation of the property; and the place is exceptional with respect to all property "in transit," whether destined to a point within or without the state. It cannot therefore be reasonably maintained that the law is aimed at a class of property *because* it is intended for export.

Before leaving this part of the subject, the attention of the Court is called to the general and particular legislation conferring the taxing power on the Village of Ontonagon. This legislation is referred to in the transcript on pages 25 and 26 in stipulations numbered 5 and 8.

Act No. 3 of the Laws of 1895, is also contained in

Vol. 1 of the Compiled Laws of 1897, and contains the following provision on page 913.

> "(2852) Section 1. The Council shall have authority to raise by general tax upon the real and personal property liable to taxation in said Village (exclusive of taxes or highway and street purposes and not otherwise provided for in this Act) such sum not exceeding in any one year one and one-fourth of one per cent of the assessed value of such property, as they shall deem necessary for the purpose of defraying the general expenses and liabilities of the corporation and to carry into effect the powers in this act granted. The moneys so raised shall constitute a 'general fund.'"
>
> Hereupon follow other Sections permitting taxation for other purposes.

Act No. 319 of the Laws of 1893 (Local Acts), reads as follows:

> "AN ACT to allow the Village of Ontonagon, in the County of Ontonagon and State of Michigan, to borrow money and issue bonds in the sum of thirty thousand dollars to build water works and electric lighting plant.
>
> "Section 1. The People of the State of Michigan enact, That the Village Council of the Village of Ontonagon, from and after the passage of this act is hereby authorized and empowered to borrow on the faith and credit of said village a sum of money not exceeding thirty thousand dollars for a term not in excess of fifteen years from the date of issue, at a rate of interest not exceeding six per cent per annum, payable annually; and to execute the coupon bonds of said Village therefor in such form as the said Council may by a two-thirds vote of all the members elect determine; and to provide for the pay-

ment of the same, which bonds shall in no case be disposed of at less than their par value, and shall be paayble at such place or places as said Council shall direct.

"Sec. 2. All money borrowed under the provisions of this act shall be applied to the purchase or building of suitable water works and electric lighting plant for the use of said Village, under such rules and regulations as said council shall prescribe.

"Sec. 3. It shall be the duty of said council to provide, by tax upon taxable property or from any fund it may have and not otherwise appropriated, for the said sum of thirty thousand dollars and interest upon all bonds issued under the authority of this act. *Provided*, That no bonds shall be issued or money borrowed for such purposes until the question shall be submitted to the electors of the village at a special election called for that purpose by the council; and a majority of the electors voting at such election, voting therefor, shall decide.

"This act is ordered to take immediate effect.

"Approved March 24, 1893."

Act No. 283 (appearing erroneously in the transcript as No. 263) of the Laws of 1895 (Local Acts), reads as follows:

"An ACT to allow the Village of Ontonagon, in the County of Ontonagon and State of Michigan, to borrow money and issue bonds in the sum of twelve thousand dollars, to extend its system of water works and to complete its electric lighting plant.

"Section 1. The People of the State of Michigan enact, That the Village council of the Village of Ontonagon, from and after the passage of this act, is hereby authorized and empower-

ed to borrow, on the faith and credit of said village, a sum of money not exceeding. twelve thousand dollars for a term not in excess of twenty years from the date of issue, at a rate of interest not exceeding six per cent per annum, payable annually; and to execute the coupon bonds of said village therefor in such form as the said council may, by a two-thirds vote of all the members elect, determine; and to provide for the payment of the same, which bonds shall in no case be disposed of at less than their par value, and shall be payable at such place or places as said council shall direct.

"Sec. 2. All money borrowed under the provisions of this Act shall be applied to the extension of the system of water works and the completion of the electric lighting plant for the use of said village, under such rules and regulations as said council shall prescribe.

"Sec. 3. It shall be the duty of said council to provide by tax upon the taxable property or from any fund it may have and not otherwise appropriated, for the said sum of twelve thousand dollars and interest upon all bonds issued under the authority of this act: *Provided*, That no bonds shall be issued or money borrowed for such purposes until the question shall be submitted by the council to the electors of the village at any regular annual election, or at a special election called for that purpose; and a two-thirds majority of the electors voting at such election, voting therefor, shall decide.

"This act is ordered to take immediate effect.

"Approved February 13, 1895."

III.

It does not follow that because, in the sense of the laws of Michigan, the logs were "in transit" to a place without the state that they were in course of export in the Federal sense.

It may be safely said that this Court will hesitate before making a decision which would exempt from state taxation altogether all timber cut in Michigan and placed in its streams for partial or total transport with a destination outside of the state. Its timber product is very large and that part of it destined for export is only less large. In this the litigants in this case agree.

> "The streams of Northern Michigan are extensively used for the transportation of forest products to points within and points without the state." * * * (Appellant's brief, p. 34.)

Here may also be properly noticed certain strained and unwarranted assumptions in the brief touching this subject; on page 36, it is said:

> "It is admitted in this case, *as a fact*, that complainant's logs were *actually started* in the course of transportation to Green Bay, at a point on the Ontonagon river beyond the municipal limits of the Village of Ontonagon, and were floated down to the yards, and there delivered to the Railroad Company for the balance of the transportation. It is further admitted that these logs were as a *matter of fact* in transit * * ".

"In the Errol case, the essential question was whether the property was actually in transit or not, while in the case at bar it is *admitted that the property was in transit.*"

At page 37:

"In the present case the logs had *started* on their ultimate passage in the course of transportation, before this assessment was made * * * * *."

At page 38:

"By stipulation of the parties this essential *fact* (viz: that the property was in transit) is admitted * * *."

The italics in the above extracts are mine. It may be confidently asserted that the record contains nothing to warrant these statements, and other similar statements, contained in the brief. Indeed the record expressly negatives them, or negatives the implication they seem intended to convey; thus,

"6. That at the close of the season of 1898 the logs in *controversy* were *held by said complainant and detained* and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant, the Village of Ontonagon, *waiting the delivery for transportation*, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been so *held and detained by* the complainant in the regular course of its business," etc. (Again the italics are mine). See also in the same stipulation "7" next following. (Transcript pp. 27, 28.)

So stands the record on the stipulated facts. The defendant's answer, in so far as it contains allegations upon the subject, shows plainly that the words "in transit" are used in the sense of the Michigan statute, and not otherwise, thus:

> "Fifth. Touching the matters relating to the question whether said property is subject to taxation in the said Village of Ontonagon, these defendants say that they are advised and believe, and thereupon allege the fact to be, that all of the property mentioned in said bill of complainant, whether the same be more or less than is alleged in said bill, namely, all the logs in the Ontonagon river and its tributaries belonging to the complainant intended to be removed down said stream to and into the Village of Ontonagon, thence to be shipped by rail as in said bill alleged, are, under and by virtue of the laws of Michigan, taxable in said Village of Ontonagon as well as in said Township of Ontonagon, said village last named being in said township last named. And they further aver that all of said property so situated, be the same more or less in quantity, are forest products and are in transit to a place without the State of Michigan, namely, in said Green Bay.
>
> "That the water transit of said property has heretofore ceased, and will continue to cease, in the Village of Ontonagon and in said Township of Ontonagon, whence the same is and is to be shipped by rail as aforesaid. The said Ontonagon river and its tributaries are streams of water or rivers all within the State of Michigan and within the County of Ontonagon, in which said Village of Ontonagon is situate."
>
> (Transcript pp. 12, 13.)
>
> "These defendants further aver the fact to be

that all of the logs of said complainant in said river or stream and its tributaries were at the time of the assessment of 1899 made by the authorities of said Village and Township of Ontonagon, in transit within the meaning of the laws of Michigan touching the taxation of logs and forest products in transit."

"These defendants further aver that for ten years, or thereabouts, previous to the destruction by fire of complainant's mills at Ontonagon, said township of Ontonagon assessed for taxation year by year, all of said complainant's logs in said river and its tributaries, whether situate at the time of assessment in said Ontonagon township, or in other townships in said County of Ontonagon, or in the County of Gogebic, through part of which latter county part of said river and its tributaries run, as in transit to said mills in Ontonagon, and that said complainant acquiesced in such assessment, and for said years paid the taxes levied thereon year by year without protest, and that for two years after the destruction by fire of said mills, said Township of Ontonagon in like manner assessed all of said logs so afloat as in transit, and that said complainant acquiesced in like manner in said assessment, and paid without protest (except as to 1898 a general protest, and not on the ground that said logs were not in transit) the taxes levied in said assessments in said above named two years year by year. And defendants further aver that during all of said years, before and after the destruction of their said mills, said complainant treated said logs as in transit to their said mills in Ontonagon and Green Bay respectively." (Transcript pp. 15, 16.)

It thus clearly appears that no part of the record justifies the assumption that admission has been

POOR COPY

anywhere made that the property in question when taxed was in actual process of export, as numerous parts of appellant's brief seem to declare or intimate. Whether it was or was not "in transit" so as to be subject to the Michigan statute fixing a place for the assessment of property in that state or condition, was the leading question of the litigation below, affirmed on the one side and denied on the other, both in pleadings and argument.

IV.

The case of *Coe* v. *Town of Errol* seems to cover the case at bar and rule it in favor of the defendant, so far as concerns the alleged conflict between the Statute of Michigan and the Constitution of the United States. In both cases the logs are placed in a water course to be thence floated down (and thence in the case at bar carried by rail) to a point without the state. It was there agreed, as it is here agreed, that for many years the complaining party had cut large quantities of timber in the state and floated (and carried by rail) them to their mills in another state. It was there and is here contended that under such circumstances the logs were exempt from state taxation in consequence of the Constitution of the United States. The question was there, as it is here,

> "Are the products of a state, although intended for exportation to another state and partially prepared for that purpose by being

deposited at a place or port of shipment within the state, liable to be taxed like other property within the state?"

"Does the owner's state of mind in relation to the goods, that is, his intent to export them and his partial preparation to do so, exempt them from taxation?"

The following quotations from the opinion seem to fit the case at bar with precision.

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state subject to its jurisdiction and liable to taxation there if not taxed by reason of their being intended for exportation but taxed without any discrimination in the usual way and manner in which such property is taxed in the state."

Here the property was taxed in the usual way and manner in which such property is taxed in Michigan.

Here it is agreed that the property, on the day of assessment, was frozen up in the Ontonagon river where it had been deposited, behind a boom. That it did not begin to move down the river until about a month after the assessment, and was not put up-

on the cars for transportation at the mouth of the river for a like time. (Transcript, pp. 27, 28. Stipulations numbered 5 and 6.)

> "Although intended for exportation, they may never be exported. The owner has a perfect right to change his mind, and until actually put in motion for some place out of the state or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state?"
>
> "That such goods do not cease to be part of the general mass of property in the state subject as such to its jurisdiction and to taxation in the usual way until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject."
>
> "But this movement does not begin until the articles have been shipped or started for transportation from one state or another. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of the journey."
>
> "Until shipped or started on its final journey out of the state, its exportation is a matter altogether *in fieri* and not at all a fixed and certain thing."

I see no way to add anything which would be as cogent as these quotations from the opinion of the Court, bearing upon the present case, and respectfully submit that the decree of the Circuit Court should be affirmed.

T. L. CHADBOURNE,
Solicitor for Appellees.